

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
GREENVILLE DIVISION**

**ESSEX INSURANCE COMPANY,**

**PLAINTIFF,**

**VS.**

**CIVIL ACTION NO. 4:05CV103-P-B**

**GREENVILLE CONVALESCENT HOME,  
INC.; TRESSIE GREEN, ET AL.,**

**DEFENDANTS.**

**ORDER**

These matters come before the court upon the Green Family's Motion to Dismiss [9-1] and Greenville Convalescent Home's Motion to Dismiss [13-1], both filed pursuant to Fed. R. Civ. P. 12(b)(6). After due consideration of the motions and the responses filed thereto, the court finds as follows, to-wit:

It is the purpose of a Rule 12(b)(6) motion to test the formal sufficiency of the statement for relief; it is not a procedure to be invoked to resolve a contest about the facts or the merits of a case. *E.g., Murray v. Amoco Oil Co.*, 539 F.2d 1385 (5<sup>th</sup> Cir. 1976). On a Rule 12(b)(6) motion, the court's inquiry is essentially limited to the content of the complaint. *E.g., Cinel v. Connick*, 15 F.3d 1338, 1341 (5<sup>th</sup> Cir. 1994), *cert. denied* 513 U.S. 868. While deciding a Rule 12(b)(6) motion, allegations of the complaint should be construed favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. *E.g., Shipp v. McMahon*, 234 F.3d 907 (5<sup>th</sup> Cir. 2000), *cert. denied* 532 U.S. 1052.

The test usually applied to determine the sufficiency of the complaint was set out in *Conley v. Gibson*, 355 U.S. 41 (1957). Justice Black, writing for the majority, wrote:

[I]n appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

*Id.* at 45-46.

In any event, a dismissal under Rule 12(b)(6) is not final and the court may normally give leave for a plaintiff to file an amended complaint. *E.g., Hart v. Bayer Corp.*, 199 F.3d 239 (5<sup>th</sup> Cir. 2000). “The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in his pleading. This is true even though the court doubts that plaintiff will be able to overcome the defects in his initial pleading.” 5B Fed. Prac. & Proc. Civ.3d § 1357.

Having evaluated the instant motions to dismiss under these standards, the court concludes that the motions should be denied.

**IT IS THEREFORE ORDERED AND ADJUDGED** that:

(1) The Green Family’s Motion to Dismiss [9-1] is **DENIED**; and

(2) Greenville Convalescent Home’s Motion to Dismiss [13-1] is likewise **DENIED**.

**SO ORDERED** this the 8<sup>th</sup> day of August, A.D., 2006.

/s/ W. Allen Pepper, Jr. \_\_\_\_\_

W. ALLEN PEPPER, JR.

UNITED STATES DISTRICT JUDGE